SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 715

FREDERICO G. RANDACCIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

CHARLES CACI, also known as Bobby Milano; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a Pat Natarelli; and LOUIS SORGI,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Frederico G. Randaccio, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 30, 1968 which judgment affirmed a judgment of the United States District Court for the Western District of New York entered on a jury verdict convicting defendant of conspiring to commit robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314.

(a) Opinions Below

The United States Court of Appeals for the Second Circuit in affirming the judgment of conviction entered in the District Court, wrote an opinion which is not as yet reported, a copy of which is annexed hereto as Appendix "A". The District Court, in denying defendant's motion to dismiss the indictment because the Grand Jury which returned the same was not selected and drawn in compliace with federally madated stadards, wrote an opinion, a copy of which is annexed here to as Appendix "B".

(b) Jurisdiction

(i) The judgment of the Court of Appeals was dated October 8, 1968 and entered on the same day.

(ii) Petitioner moved for a rehearing and a hearing *en banc* by the United States Court of Appeals for the Second Circuit, which motion was denied by order dated and entered October 8, 1968.

(iii) The jurisdiction of the Supreme Court to review the judgment herein by Writ of Certiorari is conferred by Sections 1 and 2 of Article III of the Constitution of the United States; Section 1254(1) of Title 28, U. S. C.; Rule 37(c) of the Federal Rules of Criminal Procedure; and Rule 22(2) of the Rules of the Supreme Court of the United States.

(c) Questions Presented

1. Whether or not the defendant Randaccio whose only defense on the facts was that of an alibi was entitled to have the Court charge on the subject of his alibi defense, especially in the light of a special request embodying a correct instruction on the subject after the Court failed to mention his defense in the course of its main charge.

2. Whether or not there was federal jurisdiction with respect to the conspiracy charged in Count I of the indictment?

3. Whether or not it was error for the trial court to charge the jury that it was not necessary for the government to prove that any of the defendants knew or understood that the carrying out of their plan or conspiracy would affect, delay or obstruct interstate commerce?

4. Whether or not it was error for the Court to charge the jury in substance that they could convict the defendant under Count II if the jury found that the "fencing" of the jewelry proposed to be stolen was to take place in California and some of the money returned to Buffalo?

5. Whether or not the method of obtaining the names of prospective jurors and compiling the jury list utilized by the clerk and commissioner of jurors for the Federal District Court, Western District of New York represents a departure from federally mandated standards?

(d) Statutes Involved

Title 18, U. S. C. § 371:

> "If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to affect the object of the conspiracy, each person so conspiring shall be guilty of an offense against the United States."

Title 18, U. S. C. § 1951:

> "(a) Whoever in any way or any degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do any-

thing in violations of this section shall be fined not more than $10,000.00 or imprisoned not more than 20 years, or both."

Title 18, U. S. C. § 2314:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud:

"Shall be fined not more than $10,000.00 or imprisoned not more than 10 years or both."

Title 28, U. S. C. § 1867:

"Any citizen of the United States who has attained the age of 21 years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

2) He is unable to read, write, speak and understand the English language.

3) He is incapable by reason of mental or physical infirmities to render efficient jury service."

(e) Statement of the Case

Facts

Randaccio appealed from a judgment of conviction in the United States District Court for the Western District of New York adjudging him guilty of the crime of conspiracy to obstruct, delay and affect commerce by robbery in violation of § 1951, Title 18 U. S. C., and the crime of conspiring to transport merchandise, securities or money in interstate commerce, knowing the same to have been stolen in viola-

tion of § 2314, Title 18 U. S. C. The defendant Randaccio was sentenced to twenty years imprisonment on the first count and five years on the second count to run concurretly.

The only evidence connecting Randaccio with the alleged conspiracies charged was the testimony of the accomplice Calabrese. Despite the long record developed at the trial, the testimony concerning the claimed participation of Randaccio was very brief. Calabrese, who had committed numerous armed robberies and other crimes in the City of Buffalo (R. 377 *et seq.*, 450 *et esq.*),* testified that in February of 1965, while he was in hiding after a daylight armed robbery by him of the office of the Treasurer of the City of Buffalo (R. 387), he was invited to the home of the defendant Natarelli at 60 Manchester Place in the City of Buffalo (R. 191). He testified that he was told to be there on a Friday evening "anywhere from seven-thirty to eight o'clock" (R. 191). This was Friday, February 5, 1965.

He testified that he arrived at the appointed place at approximately "Six-thirty or seven-thirty" (R. 191, 193). He said that the defendants Cino and Natarelli were present when he arrived (R. 191). He further testified that Natarelli told him "We got a couple of good scores for you out of town."** Calabrese said that about a half an hour later the appellant Randaccio arrived (R. 194). He said that the four of them then went into another room in the house and that Natarelli told him about "the two scores in Los Angeles".

Assuming to quote the defendant Natarelli, Calabrese testified that Natarelli said, "We got one, a heist right up your alley, and we got one, a jewelry, with a woman coming in with $400,000 worth of jewelry that we want you to

* ("R") refers to record.

** In the parlance of the accomplice Calabrese the word "scores" means robberies.

take'' (R. 195). Asked whether any of the others present said anything Calabrese answered as follows:

> ''Yes. Freddie (Randaccio) told me—I said to Freddie, 'Am I going to do this by myself?' He said, 'No, we'll have Stevie (Cino) coming out in a couple of days to help you out.' He said, 'These two scores, I want you to do the jewelry one first and then take care of the armored truck afterwards.' He said, 'You don't have to worry about anything, all the security is taken care of.' He said, 'We got the connection out there for you.' Then Pat (Natarelli) asked me—he jumped in the conversation—he asked me if I know or remember Louis Sorgi. I said to him, 'Is that the guy that used to work at the Why Not?' '' (R. 195, 196).

The Louis Sorgi mentioned was, of course, the defendant Louis Sorgi who somehow or other had become the chief security officer of the Beverly Hilton Hotel who, according to Calabrese, was to ease his way in connection with both of the proposed robberies (R. 196). The woman referred to was a Mrs. McCune, a frequent guest at the Beverly Hilton Hotel (R. 1094) and the armored truck was a truck which took the day's receipts of the Beverly Hilton Hotel in Los Angeles to the United California Bank for deposit (R. 719).

Calabrese then gave a long and detailed account of his trip to California (R. 201 *et seq.*). Mrs. McCune became ill and did not come to the hotel as allegedly anticipated by the claimed conspirators and neither of the proposed robberies was ever attempted (R. 243-44). The testimony with respect to Calabrese's alleged futile wait for her to check into the hotel and his alleged frustrations constitute a major portion of the record. There is no further testimony on his part affecting the defendant Randaccio.

The defendant Randaccio asserted an alibi defense. Fortuitously for him and through no original intention on the part of the Government to provide the basis for the

same, it did just that. Apparently Randaccio had a friend—a girl friend—whose apartment was bugged in a manner that permitted Government agents to monitor conversations in her apartment and those had over the telephone. Randaccio was heard by the agents to enter her apartment at approximately 7:50 on the evening of February 5, 1965 (R. 1914). Accordingly, it is clear that he entered the apartment at or about the time that Calabrese placed him nine-tenths of a mile away at 60 Manchester Place as a participant in the conversation in which the prosecution claims the conspiracies were hatched.

When the defense learned of the bugging long colloquies took place on the subject of the "electronic logs" (see, for example, R. 1911 *et seq.*). The matter of calling the agents as witnesses—in effect, alibi witnesses for the defense—was discussed with the Court (R. 1911 *et seq.*). The matter of revealing what was overheard and the possible application of § 605 of the Communications Act became a matter of serious concern to the Court. Finally, to obviate the calling of Government witnesses and the legal obstacles and conflicts arising therefrom a stipulation was entered into reading as follows:

> "The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place. At 7:50 P. M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises."

The Witness referred to in the stipulation is not the appellant's girl friend but the Government's agent monitoring the conversation (R. 1913). Importantly, the agent heard Randaccio enter the apartment at 7:50 P. M. on the evening of February 5, 1965 and heard his voice at that time and heard his voice "in the early morning of the day of the 6th" (R. 1914). He heard no conversation in between time for the reason that upon Randaccio's arrival the television was turned up loud and remained so for several hours. This was due to the fact that Randaccio had an incurable ear condition which made it impossible for him to hear the television unless the volume was turned very high (R. 2007-2008).

The accomplice Calabrese, whose sole testimony was offered against the appellant Randaccio, had a long record of armed robberies and other crimes (R. 441 *et seq.*). He laconically stated that he "pulled quite a few stick-ups in the City of Buffalo" in 1960 and 1961 (R. 441). He said he stuck up the gas company (R. 443) and a dairy by the name of Jones-Rich (R. 443). He said that both of these stick-ups were at "gun point" (R. 444). He told in some detail about the Dairylea job where he obtained $10,000 in cash and $20,000 in bonds (R. 444). He admitted a purse snatching where he obtained $100,000 in cash and two diamond rings (R. 445). Apparently in consideration for his testimony he was not prosecuted for any of these crimes.

He walked into the office of the Treasurer of the City of Buffalo in broad daylight on December 29, 1964 with a gun and stole $200,000, terrorizing those present (R. 377). For this crime he was prosecuted and on his trial, according to his own admission, committed extensive perjury (R. 378 *et seq.*). He admitted other robberies, thefts and lies (R. 379 *et seq.*; R. 450 *et seq.*). For the City Hall robbery he

received a sentence of only five years imprisonment (R. 457) and was released on parole after serving two and a half years. Evidently this was in return for aiding the Government.

The facts suggest that his trip to California which he ascribes to the defendants was more likely a flight and concealment on his part for fear of apprehension for the many crimes for which he was wanted.

(f) ARGUMENT

The refusal of the Court below to instruct the jury with respect to the alibi defense of the defendant Randaccio was error requiring reversal and a new trial on both counts.

The affirmance of such refusal is in direct conflict with the decisions of the Third Circuit Court of Appeals on the same matter.

As appears from our statement of facts the defendant Randaccio relied heavily upon an alibi defense based upon a stipulation placing him at a location approximately a mile away from the place where it is claimed that he entered into the conspiracies charged in the two counts of the indictment at the time that the uncorroborated accomplice Calabrese stated that he was present and participated in the formation of the conspiracies. The Court charged the jury without any mention of the alibi defense whatever. Counsel for the defendant Randaccio, prior to the charge, had requested the Court to charge as follows:

> "The defendant, FREDERICO G. RANDACCIO, has raised the defense of alibi in that he has introduced proof by way of a stipulation between himself and the Government that at 7:50 p. m. on the evening of February 5th, 1965 he was at another residence in the City of Buffalo, nine-tenths of a mile away from the place where the al-

leged meeting of the other alleged co-conspirators was to have taken place.

"I charge you that if this proof, when taken into consideration with all the other evidence, raises a reasonable doubt in your mind as to the defendant Randaccio's guilt, then he is entitled to an acquittal."

In *U. S. v. Marcus,* 166 F. 2d 497 (3d Cir. 1947), the Court stated:

> "By the weight of authority it is held that the instructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, *are not enough in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time. If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi,* as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt." (166 F. 2d p. 503.) (Italics ours.)

The only affirmative proof offered by the defendant Randaccio on his case was in support of his alibi defense. The stipulation upon which it was predicated was characterized by his counsel in summation as *"the most decisive disclosure of all"* (R. 2212). The prosecutor in the course of his summation said that it is "upon this stipulation that the defendant Frederico Randaccio *sort of put all his eggs in one basket"* (R. 2399). Despite the fact that the alibi constituted the defendant Randaccio's defense it was unmen-

tioned in the Court's charge. When the defendant's counsel through the appropriate request to charge, *supra,* called the same to the Court's attention the Court said:

> "Many of these requests" (including the one with respect to the alibi defense) "seek to take the defendant Randaccio separately and treat, as it is, certain phases of the case against him. Throughout my charge I have studiously tried to avoid discussing facts on one side or another, in other words, avoided marshalling the evidence, because that puts a burden on the Court that is very difficult to fill. If I marshal one side's facts, I must marshal all the facts. Sometimes I think a Court is apt to place greater emphasis on one side than another. In substance, I believe that the principles embodied in these late requests to charge have been charged. I decline to charge in the language chosen. *You have, of course, an exception to my failure to charge.*" (A. 57a)

In the language of the *Marcus* case, *supra,* the charge as given by the Court was "*not enough* in cases involving the necessary presence of the accused at a particular time and place when the accused produced testimony that he was elsewhere at the time". The charge as requested was a correct statement of the law. Indeed, it was less than that to which the defendant was entitled, but if it could be said that the request was in any respect inaccurate even so, it was error for the Court not to charge on the subject. In the *Marcus* case the Court said:

> "We think it" (the requested charge) "clearly states the situation, but even if it did not, since an instruction on the issue was requested, it was the court's duty to itself compose and give a proper instruction on the subject. (Citing cases.) See United States v. Schaerman, 3 Cir., 150 F. 2d 941, at page 946, in which this court said: 'It seems settled that, where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the defendant into a requested special instruction, which is

> not given in charge to the jury in substance or in effect or is not covered in the general charge of the court, refusal to give the instruction is reversible error.' (Citing cases.)"

In *U. S. v. Barrasso,* 267 F. 2d 908 (3d Cir. 1959) each of the defendants relied upon an alibi defense. However, the Court proceeded to charge the jury without any mention of the alibi defense whatsoever. When counsel brought the omission to the Court's attention the Court supplemented its charge, stating in substance that if the jury believed the defense that that ended the case. In reversing the Third Circuit said:

> "In thus charging the jury the court omitted altogether the conception and rule that the accused has to do no more than to create in the minds of the jurors a substantial doubt concerning his whereabouts at the time in question. Indeed, the court may well have suggested to the jury that the accused bore the burden of persuasion on the alibi defense when it charged: *'if you believe the testimony as to his being elsewhere* (that alibi) is a perfectly good defense.' (Italics ours.)
>
> "We are not persuaded by the government's argument that all of this was cured by a quite proper and forceful general instruction stating in clear language that throughout the case the burden remains on the government to convince the jury of guilt beyond reasonable doubt." (267 F. 2d at p. 910)

The Court's statement *apropos* of defendant's requests that the same "seeks to take the defendant Randaccio separately and treat, as it is, certain phases of the case against him" was quite correct. That was what counsel was endeavoring to have the Court do. No other defendant had asserted an alibi defense and therefore it was important that this defense on the part of the defendant Randaccio be the subject of an enlightening charge. The defendant Randaccio had a right, as did each defendant, to have the

evidence as to him separately considered just as if he were being tried alone.

It is inconceivable that if the defendant Randaccio was being tried alone that it would not be error for the Court to refuse charge on the subject of his alibi. The Court's refusal to charge as requested aggravated the Court's failure to charge at any time that the evidence as to each defendant should be separately considered. The Court's misconception of the defendant's right in this respect was clearly evidenced by his refusal to charge as requested on the ground that to do so was to treat the defendant Randaccio separately. The long and short of the matter is that this defendant's defense and the burden of proof with respect to the same was unmentioned. The jury was left wholly uninstructed on the subject.* This, we submit, was the plainest of error.

There is and can be no question about the timeliness of defendant's request to charge on the alibi defense. In the first place the defendant would have the right to expect the Court to cover the same in its main charge without specific request. In both the *Marcus* and *Barrasso* cases it was after the Court failed to do so in the main charge that the defendant first called the Court's attention to the failure to cover the subject. In the case at bar the Court made reference to the fact that the request on this subject was included with a few others given to the Court shortly before its charge. It developed, however, that the same had been discussed with the Court late in the afternoon of the day before he charged. The Court did not put its refusal to charge on any basis having to do with timeliness. Indeed, the Court said "My comment about the lateness of the re-

* They undoubtedly believed that the defendant had the burden of establishing his alibi!

quests are not the cardinal problem" and went on to say "I decline to get specific at this time or any other time on this charge". Herein lies the error. The defendant Randaccio was entitled to have the Court charge on this specific subject and prior to the Court's charge posed an appropriate request on the subject.

The judgment of conviction on Count I should be reversed and the count dismissed because there is no federal jurisdiction.

If the uncorroborated testimony of the accomplice Calabrese is to be believed, the defendant conspired to rob the messenger of an armored truck company acting for the Beverly Hilton Hotel in Los Angeles, California transporting a day's receipts to the office of the armored truck company where the receipts would rest overnight and on the next day be transported to the United California Bank for deposit. The Government claims that because the receipts included checks drawn by guests on out-of-state banks they could be said to be moving in interstate commerce *before* they were deposited. Each check bore a restrictive endorsement placed on it by the hotel, "for deposit" (R. 719).

The armored truck company was in the employ of the hotel and the taking of the pouch with the day's receipts from the messenger on his way from the hotel controller's office to the truck would be no different from the robbery of a bellboy on his way to the bank to deposit the same items. Indeed, it would be no different from the robbery of the cashier while going from her cage to the controller's office to put the items in the pouch to be picked up by the messenger, or the robbery of the cashier at her station of duty while the items were residing in her drawer. Such a robbery would seem little different from the robbery of a

guest in the act of paying his bill by a check on an out-of-state bank.

Certainly federal jurisdiction under Section 1951 does not attach every time a citizen or his messenger is robbed on his way to a bank just because he has a check drawn on an out-of-state bank which he intends to deposit with his bank. The robbery of a man on his way to a railroad station or an airport to take a train or plane to another city would not become a federal crime merely because he was carrying money which he intended to spend in another state, or travelers checks which he intended to cash in another state or country. If the contention of the Government can prevail in this case, then almost every robbery and conspiracy to rob would constitute a federal crime. Our argument is that the checks, if there would have been any in the messenger's possession, would not have entered into interstate commerce at the time of the proposed taking of the pouch from the possession of the employee of the hotel's agent trucking compnay.

The Courts have considered the question of when goods can be said to have entered interstate commerce. In *United States v. Fox,* 126 F. 2d 237, 238 (2nd Cir. 1942) the Court said that the goods enter interstate commerce when they have "finally left the shipper's possession and have come into the possession of any of those who are to forward them upon an interstate journey,". Again, in *United States v. Sherman,* 171 F. 2d 619 (2nd Cir. 1948) this Court said:

> "We then made it the test that the goods should leave the possession of the shipper, and come into the custody of someone who without more than inevitable pauses was to pass them along" (171 F. 2d at p. 622).

Applying the "test" of the *Fox* and *Sherman* cases we believe that it becomes clear that the checks had not left the

hotel's possession. The physical possession of the pouch was in the hands of its agent for a specific purpose, delivery to its bank where the cash would be credited and the other items processed. If the hotel be regarded as the "shipper" the goods had not left its possession and if the bank be regarded as the potential shipper the bank would not have even gained possession. On neither theory applying the test of the *Fox* and *Sherman* cases could the checks be said to have entered interstate commerce.

In the *Fox* case the shipper's servant made out a through bill of lading for the goods in question and a "shipping order" and delivered both along with the goods to the servant of the truckman who picked them up in a hand car and took them to the truckman's place of business. Two of the servants of the truckman then put them on a motor truck and with the documents mentioned drove to the freight yard of the Erie Railroad in New York. One of the men took the bill of lading to the receiving clerk who signed it and gave it back to him. Upon his return to the truck he participated in the theft of a carton and delivered it to the accused under circumstances proving his guilty knowledge. Thus, it appears clearly that the possession of the goods had passed to the Erie Railroad Company before the theft. In the *Sherman* case the theft was of certain bales from a truck located on a dock beside a steamship. They were stolen while the driver was in the steamship office securing from the carrier the papers which would evidence his delivery of the bales.

In *United States v. Sherman*, 171 F. 2d 619, this Court observed that "It may be difficult by general proposition to distinguish between the continuous journey of persons and goods" and then quoted from *United States v. Yellow Cab*

Co., 332 U. S. 218, (1947), to the effect that the limits of interstate shipments of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. Nevertheless, we believe that the reasoning of the Yellow Cab case is pertinent and the following quotations from it apposite:

> "But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. (Citing cases.) And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.'" (citing cases.) 332 U. S. at p. 231.

And further,

> "Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement." 332 U. S. at p. 232.

And further

> "From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey." 332 U. S. at p. 232.

The alleged conspiracy was to rob the messenger of money (not checks or other items) which money certainly could not be said to be moving in interstate commerce unless upon a theory that all money is destined sooner or later to find its way into interstate commerce. With the federal courts constantly burdened with an ever-growing volume of cases, civil and criminal, it is not in the public interest for federal courts to reach for criminal cases not within

their jurisdiction, merely because a serious offense is charged or because a state prosecution is made more difficult by the requirement of corroboration of an accomplice's testimony, whereas federal prosecution can succeed without such corroboration. The following language of the Court in *Twitchell v. United States*, 313 F. 2d 425 (9th Cir. 1963), is pertinent:

> "And we think that federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes via the conspiracy route. (See the opinion of Harlan, J., concurring in part and dissenting in part, in Ingram v. United States, 1959, 360 U. S. 672, 683, 79 S. Ct. 1314, 33 L. Ed. 2d 1503; *cf.* Jackson, J., concurring, in Krulewitch v. United States, 1949, 336 U. S. 440, 455-458, 69 S. Ct., 716, 93 L. Ed. 790.) That appears to us to be what happened here" (313 F. 2d at p. 428).

The conviction under Count I should be reversed because the Court erred in charging the jury that it was not necessary under this count for the government to prove that any of the defendants knew or understood that the carrying out of their plan or conspiracy would result in an affect, delay or obstruction of interstate commerce.

Although the indictment charged the defendants with a conspiracy to "obstruct, delay and affect commerce and the movement of mony in commerce", the Court charged the jury as follows:

> "It is not necessary under this count of the indictment that the government establish that any of the defendants knew or *understood* that the carrying out of their plan or conspiracy would result in an affect, delay or obstruction of commerce" (A. 436a).

This was plain error, going to the heart of the case—indeed, to the jurisdiction of the Court. The Supreme

Court of the United States in *Ingram v. United States*, 360 U. S. 672 (1959), quoting from *Direct Sales Co. v. United States*, 319 U. S. 703, 711 (1943), said,

> "Without the knowledge, the intent cannot exist. * * * Furthermore, to establish the intent, *the evidence of knowledge must be clear, not equivocal.* * * * This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes" (italics ours).

We cheerfully concede that some of the reported cases seem to hold that if the truck had been robbed of items which it was then transporting in interstate commerce that it would make no difference whether the robbers knew or did not know that the truck was transporting checks destined for interstate commerce, but as stated by Judge Learned Hand, in the leading case, *United States v. Crimmins*, 123 F. 2d 271 (2nd Cir. 1941).

> "* * * it does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it.
>
> * * *
>
> "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past" (123 F. 2d at p. 273).

In *Crimmins* the defendant was a lawyer in Syracuse who made a practice of purchasing stolen bonds. He apparently made no inquiry as to the source of the bonds or the place where they were stolen and in the course of time bought bonds that had been stolen outside the state. Reversing a federal conviction, Judge Hand pointed out that

the jury "might have indeed concluded that if he had known that they came from outside the state, it would have made no difference in his conduct; but that is not enough; it would be no more than to say that he would have been willing to make an agreement which in fact he did not make."

The *Crimmins* case has been cited in a long line of cases. In *United States v. Bollenbach,* 147 F. 2d 199 (2nd Cir. 1944), this court said,

> "We shall assume, *arguendo,* as we did in United States v. Crimmins, 2 Cir., 123 F. 2d 271, that it may not be necessary in a prosecution for the substantive crime to prove that an accused, who knows that the securities have been stolen, also knows that they are being moved in interstate commerce. Indeed, we have so decided in the case of receivers of stolen property. Rosen v. United States, 2 Cir., 271 F. 651. But there can be no doubt that such knowledge is necessary to a conviction for conspiring to transport, since no agreement can go beyond the terms of the confederates' mutual understanding" (147 F. 2d at p. 201).

In *United States v. Sherman,* 171 F. 2d 619 (2nd Cir. 1948), the Court stated that it was not necessary for a conviction on a substantive count that the receiver of stolen goods should have known them to be stolen from foreign commerce and then proceeded to state "On the other hand, we held in U. S. v. Crimmins and in U. S. v. Bollenbach that such a scienter is necessary in a prosecution for conspiracy, and their conviction must be reversed on the third (conspiracy) count" (171 F. 2d at pp. 623-624).

In *U. S. v. Varlack,* 225 F. 2d 665 (2nd Cir. 1955), the court considered a case wherein it was claimed that the indictment did not sufficientiy describe the commerce involved. In that case a defendant also complained that the trial judge erred in failing to submit to the jury the question of whether the defendants had conspired to obstruct,

delay or affect commerce. The trial court charged in effect that a conspiracy to obstruct, delay or affect the unloading of raw sugar from an ocean-going vessel at a pier owned and operated by the American Sugar Refining Company in Philadelphia, Pennsylvania was a conspiracy involving interstate commerce as a matter of law. With this holding we have no quarrel because it is obvious that interference with the unloading of an ocean-going vessel would naturally obstruct, delay or affect interstate commerce but such would not be the natural effect of the robbery of one on his way to make a bank deposit. Defendants conspiring to interfere with the unloading of an ocean-going vessel had the requisite knowledge to make them guilty of a federally oriented crime whereas defendants conspiring to rob one on his way to make a bank deposit did not.

The rule requiring "clear proof" of specific federal intent as announced in the cases we have cited is not a mere technicality. It strikes at the very root of the federal system and involves the traditional division of legal powers between the two systems of government ordained by the Constitution. The federal courts have refused to permit the use of the conspiracy charge to fashion "a dragnet to draw in all substantive crimes" without regard to the limitations of federal jurisdiction. *Direct Sales Co. v. U. S., supra,* at p. 711; *U. S. v. Ingram, supra.* The vitality of this principle of law is apparent from the cases—almost all of which involved defendants who were concededly engaged in violations of local law. Any embarrassments or inconveniences which may result to federal officers as a consequence of the application of this principle are "a price we pay for our federalism". *Knapp v. Schweitzer,* 357 U. S. 371, 381 (1958).

The conviction under Count II should be reversed because the Court erred in charging the jury that if it was part of the conspiracy alleged in said count that the stolen jewelry would be "fenced" in California and a "part of the money then returned to Buffalo", then "obtaining cash for that property is viewed merely as a change in the form of stolen property" and that the jury could still find a "planned interstate transportation of stolen property".

Under Count II as well as under Count I we find a reaching for federal jurisdiction. The co-conspirator Calabrese testified that it was part of the plan that the jewelry to be stolen was to be "fenced" in California and a part of the money returned to Buffalo (R. 199). The Court charged on this subject as follows:

> "Pascal Calabrese testified that it was a part of the plan to take the jewelry of Mrs. McCune to a particular point in the State of California where it would be fenced and at least a part of the money then returned to Buffalo. You should understand that in law, the fencing of stolen property and the obtaining of cash for that property is viewed as merely a change in form of the stolen property. Therefore, in the event that you accept this testimony, the fact that it was planned that money rather than the stolen jewelry was to be physically transported in interstate commerce, would not avoid a finding of planned interstate transportation of stolen property".

It is true that the indictment charged that the money to be stolen was also to be transported but there was no proof that the same could or would exceed the statutory sum of $5,000, thus justifying a conviction without reference to the jewelry.

If the Court could be said to be correct in its charge then almost every absconding or itinerant robber, no matter what the subject matter of his theft, would be committing a

federal crime every time he crossed a state border with money in his pocket which could be attributed to a sale or exchange of that which he had stolen.

The question here presented was approached and left open in *United States v. Walker,* 176 F. 2d 564 (2nd Cir. 1949), where travelers checks procured by fraud were cashed and the proceeds transported across state lines. The Court held that under the facts of that case § 2314, Title 18 USCA, was violated but said "*arguendo* we may concede that there are goods, procured by means of the property of the victim, whose transportation is not within the statute" (176 F. 2d at p. 566).

The method for obtaining the names of prospective jurors and compiling the jury list utilized by the Clerk and Commissioner of Jurors for the Federal District Court, Western District of New York, which departed from federally mandated standards, requires the dismissal of the indictment and a reversal of appellant, Randaccio's conviction.

There is presented by this case an important issue involving the selection of jurors to serve in our Federal Courts. The past few years have seen a considerable amount of judicial re-examination of the method used in the Federal Courts for empanelling jurors. This case is a glaring example of how federal requirements designed to obtain jurors which represent a fair cross-section of the community have been ignored resulting in the exclusion of eligible jurors.

To understand the problem requires a review in some detail of the method used for the empanelling of jurors in the Federal District for Western New York.

In the Federal Judicial District for Western New York it is necessary for the Commissioner of Jurors to empanel

about 1,500 jurors annually (R. 26, 28). Over one-half of this annual requirement is fulfilled by resorting to the selection of jurors names from the "Jury Wheel" maintained by the State Commissioner of Jurors for Erie County (R. 22-23). This is accomplished by means of an order signed by the District Court Judge directing the County Commissioner of Jurors to furnish the Clerk of the Federal Court with 750 names of jurors qualified to sit on jury panels in the State of New York (R. 22). The names of these jurors are then placed in the federal jurors' box from which the Grand and Petit jurors were selected in the case of Frederico G. Randaccio (R. 24, 55).

The State Jury Selection System.

The State Commissioner of Jurors for Erie County selects virtually all jurors from the voter registration roles (R. 36; A. 19a). Only two-thirds of those persons over the age of 21 and eligible to vote in Erie County are registered. In some districts the voter registration of eligible voters is as low as 50%. For instance in the Niagara District and the Ellicott District within the City of Buffalo which is predominantly Italian and Negro the voter registration is 56% and 59% respectively.

Therefore, the state's use of voter registration lists to obtain names of jurors automatically excludes at least one-third, and in some districts one-half, of those persons otherwise eligible for jury service.

This group of two-thirds or one-half of all of the eligible persons for jury service obtained through this questionable process is further reduced by several significant state statutes.

Section 662 of the New York State Judiciary law provides, in part, that a juror to be qualified must be:

> "Be of sound mind and good character; of approved integrity; of sound judgment; and able to read and write the English language understandably."

Section 665 of that same law automatically exempts women from jury service.

The Deputy Commissioner of Jurors of Erie County indicated that under these provisions the group of eligible jurors already reduced by one-third is further diminished by about 50%. Therefore, those jurors, qualified by state law, which finally end up in the State Jury Wheel represent only 33⅓ percent of those persons in this community ordinarily eligible for jury service. It is from this emasculated list of jurors that the Federal District Court draws over one-half of its jurors for service in the Federal Court (R. 22).

The consequence of the imposition of these state standards upon otherwise eligible jurors in Erie County results in the exclusion of a large number of women and other persons who is in the judgment of the County Jury Commissioner are not of approved integrity or of good character or sound judgment. As an example the federal census for Erie County for 1966 shows 344,321 women over the age of 21 and presumably eligible for jury service as compared to 307,290 men. Therefore, statistically for every 10 men eligible for jury service in Erie County there should be 11 eligible women. Because of the women's automatic exemption under the state law there are only 20,692 qualified women jurors as compared to 77,071 qualified male jurors in the state jury wheel.

The net effect of this automatic exemption is the creation of a vast disparity between women jurors and male jurors in Erie County. While the federal census for 1966 reveals that there are 11 women eligible for jury service in Erie

County for every 10 men eligible, there is actually only 1 qualified female juror to every 4 qualified male jurors in the Erie County Jury Wheel from which the federal jurors are drawn.

The Federal Jury Selection System for the Western District.

The apparent constitutional deficiencies inherent in these State selection procedures are compounded by the method used by the Federal Jury Commissioner in supplementing this list of names. The Federal Jury Commissioner uses a keyman selection system (R. 39, 49). For instance when he feels that more negroes are needed to balance the panel he calls a prominent negro in the community and explains to him that he would like to have names of "good men and women, fairly intelligent, that would make good jurors * * *" (R. 39).

He then obtains other names generally from two newspapers in Buffalo, selecting those persons who have obtained some prominence in various fields of endeavor (R. 53-54). For instance, he sends out 20 post cards every week based upon names he has observed in either of the two newspapers (R. 54). After he obtains a list of those names questionnaires are filled out by those responding to the postal card request (R. 43). The Commissioner then examines the questionnaire and rejects those who he feels do not have "ordinary sense, ordinary common sense" (R. 43-44). Unidentified personnel in the Clerk's Office participate in this procedure and also make judgments rejecting some jurors (R. 44-46).

It was the use of this mongrel jury selection system, half state and half federal keyman which produced the Grand Jury which indicted the appellant Randaccio and the Petit Jury which convicted him (R. 55).

Recently the United States Court of Appeals for the Fifth Circuit conducted a complete review and analysis of the problem of empanelling juries in the Federal District Courts in the case of *Rabinowitz v. United States,* 366 F. 2d 34 (5th Cir. 1966).

The Rule of Rabinowitz.

The *Rabinowitz* court, in a single decision, formulated a series of rules for the selection of jurors which represent the mandate of Congress.

By amending Section 1861 of Title 28 in conjunction with the 1957 Civil Rights Act, Congress mandated that federal jury qualifications shall no longer be dependent upon the varied state qualifications.

The Federal Commissioner's discretion to establish qualifications not in conformity with the uniform federal standards was abolished.

The decision to exclude or excuse a single juror or groups of jurors rests solely in the hands of the Judge of a District Court.

Where a defendant can demonstrate a departure from federally mandated standards in the selection of jurors, the indictment must be dismissed and the jury venire quashed. Actual prejudice to a particular defendant need not be shown.

In the case at bar this is precisely what the Commissioner has done. By selecting over one-half of the jurors for service in the Western District of New York from the State, the Commissioner has made the selection of Federal jurors dependent upon the qualification for jurors established by New York.

All those persons not registered to vote in Erie County are automatically excluded by the State selection system and are therefore excluded from the Federal system. The same is true of the State's exclusion of women.

A remarkable similarity between the case at bar and *Rabinowitz* is found in the testimony of Commissioner Wisch, the Commissioner of Jurors for the Western District of New York. In relating how he used the keyman system he stated:

> "I tell him that I want some good men and women, fairly intelligent, that he thinks would make good jurors * * * I usually tell them I like to have a juror, when he comes into court and *listens to the charge of the judge, that he will understand it*" (R. 39, Italics ours).

These very standards were specifically condemned in *Rabinowitz* where the Jury Commissioner in that case said essentially the same thing.

> "The jury commissioners in compiling the 1959 list treated the statutory standards a minimum qualification to which they added their own ideas as to good character, intelligence and *ability to 'understand the cases that are tried in court.'* The statutory standards of qualification may not be extended by such broad and vague subjective tests as were employed in compiling the 1959 jury list" (366 F. 2d at p. 51, Emphasis Supplied).

Rabinowitz holds, in unmistakable language that the Jury Commissioner has no discretion to exclude jurors on any grounds other than those set forth in Section 1861.

> "The federal qualifications are objective and precise, requiring in their application *no discretion* on the part of the Court Clerk and the Jury Commissioner. Since Congress only conferred discretion on the Clerk and Commissioner by implication from the State statutes their discretion ceases when the state qualifications

were entirely swept away" (366 F. 2d at p. 54, Italics ours).

In *Ballard v. United States*, 329 U. S. 187 (1946), a case somewhat similar to the case at bar, the United States Supreme Court quashed the jury venire and dismissed the indictment where it was shown that the system for selecting jurors resulted in the exclusion of women.

The *Ballard* court expressed its disapproval in unequivocal terms:

> "We conclude that the purposeful and systematic and intentional exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts, * * *, to correct an error which permeated this proceeding" (329 U. S. at p. 193).
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> * * *
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> "* * * The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, * * *, or an economic or social class, * * * deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme. * * * The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (329 U. S. at p. 195).

The United States District Court for the Southern District of Florida, in *United States v. Hoffa*, 196 F. Supp. 25 (S. D. Fla. 1961), found on facts nearly identical to those of the case at bar, that the method of jury selection adopted by the Commissioner of Jurors violated the mandatory federal standards and dismissed the indictment.

Hoffa demonstrated that the Commissioner deliberately limited his selection of jurors from those persons registered to vote in the State of Florida. In the case of women, only those who had volunteered and were qualified to set as jurors in the State of Florida were selected.

The Court found:

> "Under the said procedure followed by the jury commissioner and the deputy clerk in selecting the names for the jury box, the percentage of qualified citizens deliberately excluded from serving on the jury was extremely high" (196 F. Supp. at p. 29).

The practice of Commissioner Wisch, in the case at bar, of selecting over one-half of the jurors from those qualified to sit in jury panels in the State of New York, results in an identical situation to that in *Hoffa*.

All those persons not registered to vote in Erie County are automatically excluded by the State selection system and are therefore excluded from the Federal system. The only women jurors obtained by the Federal Commissioner are those who "volunteer" by the non-exercise of their State exemption.

As the *Hoffa* court found, the natural consequence of such a system is a Federal Jury which does not represent a "fair cross-section of the community."

> "It is evident that a jury panel from which all were deliberately and systematically excluded who do not register to vote, in a community where many citizens qualified for federal jury service do not so register, and to likewise exclude all women from jury service except the very few who registered for jury service in the state court, is not a fair representation of the community" (196 F. Supp. at p. 31).

Appellant, Randaccio, has been severely restricted in his ability to present to this Court, the detailed factual analysis

found in *Rabinowitz*, of the composition of either jury box, from which the panel of jurors composing the Grand Jury or the Petit Jury was drawn. This can be solely attributed to the denial by the Trial Court of appellant's request to examine records admittedly in the possession of the Commissioner of Jurors or to open and examine the jury box from which the Petit Jurors were drawn.

However, the teaching of these cases is abundantly clear that jury commissioners cannot depart from the well defined Federal standards in qualifying jurors to serve in their districts. Under *Rabinowitz* it is now clear that departure from these standards is *per se* constitutionally impermissible and no prejudice need be shown. In the case at bar surely a *prima facie* case was established demonstrating that the procedures employed resulted in the empanelling of a jury which did not represent a fair cross-section of the community.

Undeniably the procedures employed in the case at bar for empanelling the Grand Jury which indicted and the Petit Jury which convicted the appellant, Randaccio, is clearly at variance with the mandatory standards established by Congress. These distressing departures undoubtedly produced a Grand Jury and Petit Jury which was not representative of the community. But that need not be shown. The failure to comply with the Federal statutes requires a reversal of the judgment of conviction and a dismissal of the indictment.

(g) Conclusion

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 511—September Term, 1967.

(Argued June 18, 1968 Decided July 30, 1968.)
Docket No. 32036.

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CACI, also known as BOBBY MILANO, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as PAT NATARELLI, FREDERICO G. RANDACCIO and LOUIS SORGI,

Defendants-Appellants.

Before: MOORE and HAYS, *Circuit Judges,* and TIMBERS, *District Judge.**

Appeals from judgments of the United States District Court for the Western District of New York, John O. Henderson, Chief Judge, entered on a jury verdict convicting appellants of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. § § 371 and 2314.
Affirmed.

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* Of the District Court for the District of Connecticut, sitting by designation.

Paul Ivan Birzon, Buffalo, New York, for Appellant Caci.

Peter L. Parvino, Buffalo, New York, for Appellant Cino.

Salten Rodenberg, Buffalo, New York, for Appellant Natarelli.

Frank G. Raichle, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, on the brief), for Appellant Randaccio.

Joseph P. Runfola, Buffalo, New York, for Appellant Sorgi.

Andrew F. Phelan, Assistant United States Attorney (Thomas A. Kennelly, Acting United States Attorney for the Western District of New York, Thomas H. Henderson, Jr., and Gary L. Gardner, Attorneys, Department of Justice, on the brief), for Appellee.

HAYS, *Circuit Judge:*

Appellants Charles Caci, Stephen A. Cino, Pasquale A. Natarelli, Frederico G. Randaccio and Louis Sorgi, were convicted, upon a trial by jury, of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314. We have considered the many assignments of error which have been advanced by appellants and have found no ground for reversal. The judgments of conviction are affirmed.

The indictment charged in the first count that appellants conspired to rob an armored car messenger at a Los Angeles hotel in violation of 18 U. S. C. § 1951 and in the second count that appellants conspired in violation of 18 U. S. C. § 371 to transport in interstate commerce proceeds from the

sale of jewelry which they planned to steal from a wealthy guest at the hotel. Neither of the planned robberies was executed because the guest did not come to the hotel as expected. But for the decision of Pascal Calabrese, a co-conspirator, to "cooperate" while awaiting sentence on another charge, appellants' plans probably would never have come to the attention of law enforcement officials.

Calabrese, the chief government witness at trial, testified in great detail to the following. On December 29, 1964 Calabrese robbed the Buffalo City Hall of a substantial amount of money and immediately went into hiding. A few days later Stephen Cino contacted him at a Buffalo motel and told him that "Pat" [Natarelli] and "Freddie" [Randaccio] wished to see him. A meeting was arranged for the following evening, February 5, at Natarelli's house. When Calabrese arrived at the house he found Cino and Natarelli already there. They told him that they had "a couple of good scores" for him out of town. About a half hour later Randaccio arrived, and Natarelli and Randaccio explained their plans in detail.

Calabrese was to go to Los Angeles where he would be met by Charles Caci, an entertainer who used the stage name of Bobby Milano. A couple of days later Cino would join them. Caci would introduce Calabrese to Louis Sorgi, who was in charge of security at the Beverly Hilton Hotel. Calabrese would commit two robberies at the hotel. He would rob Mrs. Walker McCune, a frequent guest at the hotel, of her jewelry which was reputed to be worth $400,000. Then he would rob the armored car messenger who visited the hotel to pick up the daily receipts. The jewelry would be taken by Cino to his uncle in San Francisco, who would "fence" it, and the proceeds would be returned to Buffalo.

It was agreed that Calabrese would have some friends drive him to Pittsburgh where he would get a flight to Los Angeles. At the conclusion of the meeting Natarelli and Randaccio gave Calabrese several hundred dollars for expenses.

When Calabrese arrived at the airport in Los Angeles, Caci was there to meet him. While driving from the airport to Caci's apartment they passed the Beverly Hilton, which Caci identified as the site of the "scores." Caci obtained an apartment for Calabrese in the building in which he lived. A few days later, on February 10, Cino arrived. On that evening Caci, Cino and Calabrese went to Sorgi's home where they discussed plans for the robberies. The next day Sorgi took Calabrese on a tour of the Beverly Hilton. They visited the suite usually occupied by Mrs. McCune and made a careful study of the tunnel used by the armored car messenger. Calabrese then left the hotel with Caci and Cino and went over the planned escape route. When they reached Calabrese's apartment, Calabrese commented that it was amazing that Sorgi had the keys to the entire hotel. Caci displayed a key that he said would open all the doors Sorgi had opened at the hotel.

Mrs. McCune was expected to arrive at the hotel on the following day, but she did not. For the next several days Caci telephoned Sorgi frequently to determine whether Mrs. McCune had come. On February 17 Cino received a telephone call from Buffalo and told Calabrese that his, Calabrese's, connection with the City Hall robbery was known to the police and that he, Cino, had been instructed to return to Buffalo lest he be found with Calabrese. Cino then left for Buffalo. Five days after Calabrese surrendered to the authorities in Buffalo.

Calabrese's testimony, only the highlights of which have been summarized here, was corroborated in many details by evidence as to hotel reservations, room rentals, and the like. Evidence that Beverly Hilton passkeys had been found in Caci's possession when he was arrested on another charge provided important support for Calabrese's story.

The government introduced evidence to show that the robbery of the messenger from Armored Transport, Inc. of the pouch containing cash and checks for delivery to the United California Bank would have affected commerce. Hotel records for February, 1965 revealed that fifty-nine percent of the checks cashed at the hotel were drawn on out of state banks. During the same period 1,150 American Express Travelers Checks were cashed at the Hotel. Other evidence indicated that both the bank checks and the travelers checks moved in interstate commerce in the course of collection procedures.

1. Construction of Hobbs Act

Appellants claim that the first count of the indictment should have been dismissed because the Hobbs Act, 18 U. S. C. § 1951, was not intended to cover the kind of robbery they were accused of plotting. Cino contends that Section 1951 applies only to cases of extortion, although Caci is willing to concede that it might apply to "highway" robbery as well. In light of the clear wording of the statute outlawing "robbery or extortion"[1] which affects

[1] 18 U. S. C. § 1951 (1964):
"Interference with commerce by threats or violence.
(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(Footnote continued on following page)

commerce, it is not surprising that appellants spend little time on analysis of the statutory language and place primary reliance on the legislative history. However, as we recently have had occasion to observe, "the proper function of legislative history is to solve and not to create an ambiguity." *United States v. Blasius*, Dkt. No. 32117 (2d Cir. July 8, 1968), slip op. at p. 2992 (citations omitted).

But, in any case, the legislative history does not support appellants' position. The Hobbs Act is the successor to the Anti-Racketeering Act of 1934. Section 2(a) of the 1934 Act in substance made it unlawful to obtain or attempt to obtain money or property by the use of force or threat of force in connection with any act affecting interstate commerce. Specifically excepted from the operation of the section was "the payment of wages by a bona-fide employer to a bona-fide employee." In *United States v. Local 807, Teamsters Union*, 315 U. S. 521 (1942), the Supreme Court read the exception very broadly to include the exaction from out of state truckers by means of threats of violence of payments equivalent to union wages, when the truckers declined to employ members of the local union to drive their trucks on that portion of their routes occurring within the local's territory. The Hobbs Act was passed for the purpose of overruling this

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(Footnote continued from preceding page)

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

. . . .

This definition of robbery was taken from the definition in the New York State statutes. See 91 Cong. Rec. 11843 (1945) (remarks of Rep. Michener); 91 Cong. Rec. 11906 (1945) (remarks of Rep. Robsion).

case. See H. R. Rep. No. 238, 79th Cong., 2d Sess. (1945), reprinted in U. S. Code Congressional Service pp. 1360-70 (1946). Thus, appellants are undoubtedly correct that the motive of Congress in enacting this legislation was to curb the kind of labor racketeering to which appellants would limit the reach of the statute.

However, the legislative history clearly indicates that Congress deliberately enacted a broad statute designed to apply to *all* robbery and extortion which affected commerce. The Hobbs Act was opposed by many who viewed it as specifically intended to hamper the legitimate activities of organized labor. See, *e.g.*, 91 Cong. Rec. 11848 (1945) (remarks of Rep. Lane); 91 Cong. Rec. 11901 (1945) (remarks of Rep. Celler). In response, supporters of the measure were able to point out that its prohibitions were applicable to all individuals and groups, see, *e.g.*, 91 Cong. Rec. 11844 (1945) (remarks of Reps. Robsion and Michener); 91 Cong. Rec. 11904 (1945) (remarks of Rep. Gwynne); 91 Cong. Rec. 11905 (1945) (remarks of Rep. Robsion), that the activities proscribed—robbery and extortion—traditionally were regarded as criminal under state law, see, *e.g.*, 91 Cong. Rec. 11910 (1945) (remarks of Reps. Springer and Robsion), and that the borrowing of state law definitions in the statute provided assurance that the terms robbery and extortion would not be extended beyond their established meanings, see, *e.g.*, 91 Cong. Rec. 11900 (1945) (remarks of Reps. Hancock and Hobbs). Throughout the debates, advocates of the Hobbs bill sought to characterize it as a traditional criminal statute neutral in its application. So interpreted, the Hobbs Act plainly covers the theft contemplated by appellants.

In *United States v. De Sisto*, 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), we affirmed the conviction

under the Hobbs Act of a defendant guilty of a crime similar to that planned by appellants. De Sisto was accused of hijacking a truck loaded with silk from Japan by means of threats of violence addressed to the driver. No elements of labor racketeering or extortion were in any way present.

Randaccio also argues that the Hobbs Act is inapplicable because checks in the possession of the armored car messenger would not yet have been moving in interstate commerce. This argument is without merit. In the first place, the language in the Act relating to interstate commerce is extremely broad, "manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U. S. 212, 215 (1960). It is sufficient under the Act that the proposed robbery would "affect" commerce. Furthermore, it is clear that the checks would have begun their journey in interstate commerce at least as soon as they were delivered by the hotel to the employee of Armored Transport, Inc., operator of an independent messenger service. See *United States v. Sherman*, 171 F. 2d 619, 622-23 (2d Cir. 1948), cert. denied *sub nom. Grimaldi v. United States*, 337 U. S. 931 (1949); *United States v. Fox*, 126 F. 2d 237 (2d Cir. 1942).

2. Accomplice Testimony

Appellant Cino attacks the sufficiency of the evidence, apparently on the ground that the uncorroborated testimony of an accomplice is insufficient to support a verdict. Although Calabrese's testimony was of crucial importance, it did not stand alone; as noted above, it was corroborated in several respects. Moreover, even if his testimony were

not corroborated, it would be sufficient to support the convictions. See *Caminetti v. United States,* 242 U. S. 470, 495 (1917); *United States v. Agueci,* 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963).

3. Effect on Interstate Commerce

Appellant Natarelli contends that the proof with respect to effect on interstate commerce was insufficient because it was limited to February, 1965 while the robbery of the messenger was not definitely scheduled for that month. However, the evidence clearly establishes that appellants intended to execute this robbery in February. The messenger was to be robbed shortly after the theft of Mrs. McCune's jewelry; Mrs. McCune was to be robbed shortly after she arrived at the hotel. And Mrs. McCune was expected to arrive on or before February 12.

4. Knowledge of Transportation in Interstate Commerce

Appellant Caci argues that there was no evidence from which the jury could conclude that he knew that the proceeds of the jewel theft were to be transported in interstate commerce. We find ample evidence from which the jury could draw this inference. Caci was intimately involved in the preparations for the theft and this fact alone provides sufficient basis for inferring that he knew how the proceeds would be disposed of. Caci knew that Randaccio and Natarelli were directing the operation from Buffalo; he must have known that they would receive their share in Buffalo.

5. Charge on Defense of Alibi

Randaccio claims that the trial court erred in refusing his request for a charge as to the burden of proof on his

alibi defense. We hold that, in the circumstances of this case, the failure to give the charge requested did not constitute reversible error.

The basis of the alibi defense was provided by information in government electronic surveillance logs as to Randaccio's whereabouts on the night of the alleged meeting at Natarelli's house. This information was transmitted to the jury in the form of the following stipulation:

"The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place [Natarelli's address]. At 7:50 P. M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises." There was also evidence that Randaccio suffered from a hearing defect the victims of which frequently turn up the volume when watching television.

Trial counsel for Randaccio sought an instruction indicating in substance that if the alibi proof when considered with the other evidence raised a reasonable doubt as to his guilt, Randaccio would be entitled to an acquittal. Apparently it was thought that such an instruction would prevent the jury from erroneously believing that the burden of establishing the alibi defense was on the defend-

ant. However, both the manner in which this request was made and the manner of objecting to its denial gave the trial court little opportunity for the reflection and deliberation which compliance with the provisions of Fed. R. Crim. P. 30 is designed to provide.

Rule 30 requires that written requests to charge be filed at the close of the evidence "or at such earlier time during the trial as the court reasonably directs." In accordance with the trial court's instructions, counsel submitted requests in advance, including twenty-five requests on Randaccio's behalf. The trial judge informed counsel of his disposition of the requests four days before he was to charge. At that time trial counsel for Randaccio indicated that he was preparing supplemental requests which would be ready later that day. The judge stated that he wished to have them as soon as possible. The additional requests were not presented until fifteen minutes before the judge began delivering his charge. At that late hour, see *United States v. Olweiss,* 138 F. 2d 798, 800 (2d Cir. 1943), motion for leave to file a petition for certiorari *nunc pro tunc* denied, 321 U. S. 744 (1944), counsel submitted four additional requests, of which the alibi request was the second.

Having given the court only the barest opportunity to consider the alibi request in advance, counsel compounded the delict by inadequately objecting to the failure to charge as requested. Rule 30 requires that counsel state "distinctly the matter to which he objects and the grounds of his objection." At the conclusion of his charge the trial judge gave the reasons for his refusal to charge the additional requests and stated, "You have, of course, an exception." Counsel presented detailed objections to other portions of the charge, but made no mention of the alibi request.

Ordinarily the failure to give an instruction on alibi defense will not be considered absent a proper request. See *United States v. Tramaglino,* 197 F. 2d 928, 932 (2d Cir.), cert. denied, 344 U. S. 864 (1952); *Goldsby v. United States,* 160 U. S. 70, 77 (1895). Assuming that in some circumstances the failure to give such a charge might constitute "plain error," see Fed. R. Crim. P. 52(a), this is hardly such a case. The alibi offered was far from compelling. Calabrese's testimony indicated that Randaccio arrived at Natarelli's place at about 8:30 or 9:00 p. m. There is nothing in Calabrese's story which is inconsistent with Randaccio's being nine-tenths of a mile away at 7:50. Under these circumstances, the court's comprehensive charge on reasonable doubt, which included the statement that the burden of proof "rests with the Government at all times" and "never shifts to a defendant," was adequate.

6. Evidentiary Rulings

Caci contends that the admission of evidence to show that certain of his recent checks had been returned for insufficient funds was prejudicial as showing the commission of other crimes. We hold that the evidence was admissible to rebut evidence of Caci's good character. Although no character witnesses were presented, Caci's counsel cross examined Calabrese about Caci's appearances on popular television shows and introduced a brochure which included a photograph of Caci in the company of a well-known entertainer. The bad check evidence also tended to show that Caci lacked funds and thus had a motive to participate in the planned thefts. This has particular significance in view of the testimony from which the jury might have gathered that Caci was a highly paid entertainer. Finally, it is difficult to see how this evidence could have seriously prejudiced

Caci, particularly since the evidence also showed that the checks subsequently had been redeposited and paid.

Caci also argues that the Beverly Hilton passkeys found in his motel room were seized in violation of his fourth amendment rights and should not have been admitted into evidence. His argument seems to be that the trial court erred in crediting the government's witness who stated that Caci voluntarily admitted the police officers to the room rather than crediting Caci's witnesses who testified that the officers broke down the door. Of course we are in no position to contradict the trial judge's determinations as to the credibility of witnesses whom we have not seen. See *United States v. Vita*, 294 F. 2d 524, 528 (2d Cir. 1961), cert. denied, 369 U. S. 823 (1962).

It is also claimed that the officers learned of the keys through interception in violation of 18 U. S. C. § 605 of a telephone conversation between one Fitzgerald and appellant, Sorgi. Since Fitzgerald, the caller, gave the officers permission to listen in on the conversation, there was no violation of Section 605. See *Rathbun v. United States*, 355 U. S. 107 (1957).

Natarelli claims that evidence that the robbery would obstruct the interstate movement of checks was inadmissible under *Stirone v. United States*, 361 U. S. 212 (1960), because the indictment charged only that the robbery would obstruct the interstate movement of money. The claim is frivolous.

7. Jury Selection

Randaccio objects to several features of the jury selection process in the Western District of New York. About one-half of the names for the federal jury box are obtained

from state jury lists. Concerning the prospective jurors so obtained, Randaccio has two objections: (1) the primary sources used by the state jury selectors are voter registration lists, so that non-voters are under-represented, and (2) New York law permits women to claim exemption from jury service, so that women are under-represented. Neither of these objections is substantial. It is well established that the use of voter registration lists as the source of names of prospective jurors is not unlawful because it results in the exclusion of non-voters. See, *e.g., United States v. Kelly*, 349 F. 2d 720, 778 (2d Cir. 1965), cert. denied, 384 U. S. 947 (1966); *United States v. Agueci*, 310 F. 2d 817, 833-34 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Indeed, voter registration lists are made the primary source of jurors in the new Jury Selection and Service Act of 1968, 18 U. S. C. A. §§ 1861-71 (Supp. July, 1968.) As to the representation of women, it is significant that three women served on the jury which convicted appellants. Since only one-half of the federal jurors are taken from the state lists and since women are represented in substantial (albeit unequal) numbers on the state lists, the under-representation of women on the federal juries is minimal. We note also that the constitutionality of the New York statute permitting women to claim exemption has been sustained. *Fay v. New York*, 332 U. S. 261, 277-78 (1947). See also *Hoyt v. Florida*, 368 U. S. 57 (1961).

One-half of the names in the federal jury box in the Western District are selected by a federal jury commissioner using a variety of methods, including the "key-man" system. As to these, Randaccio complains that the commissioner has no authority to reject jurors as unqualified except on the grounds set forth in 28 U. S. C. § 1861 (1964). The jury commissioner testified that he did not place in the jury box the names of persons whose answers to a

questionnaire indicated that they were of low mentality. It is arguable that Section 1861(3) specifically authorizes the commissioner to reject such persons as "incapable, by reason of mental . . . infirmities to render efficient jury service." In any event, it is settled in this Circuit that a jury commissioner has discretion under 28 U. S. C. § 1864 (1964) to reject prospective jurors as not "qualified" for reasons other than those listed in Section 1861. See *United States v. Flynn*, 216 F. 2d 354, 386-88 (2d Cir. 1954), cert. denied, 348 U. S. 909 (1955).

8. Motion for Severance

Caci's motion under Fed. R. Crim. P. 14 for a severance in order that he might have the benefit of Sorgi's testimony in his behalf and his alternative motion for permission to inform the jury that he had attempted to call Sorgi as a witness were both properly denied. As to the former, "The argument is unrealistic. There is no reason to think that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a defendant not to take the stand." *Gorin v. United States*, 313 F. 2d 641, 645-46 (1st Cir.), cert. denied, 374 U. S. 829 (1963). And had counsel for Caci been permitted to comment on Sorgi's refusal to take the stand, Sorgi's rights under the fifth amendment would have been violated. See, *e.g.*, *United States v. Echeles*, 352 F. 2d 892, 898 (7th Cir. 1965); *De Luna v. United States*, 308 F. 2d 140 (5th Cir. 1962), petition for rehearing denied, 324 F. 2d 375 (1963). We are aware that these cases also appear to hold that the inability of a defendant to comment on a co-defendant's refusal to take the stand in a joint trial is sufficient to require a severance. Subsequent cases, however, have read *De*

Luna and *Echeles* narrowly, confining their application to cases in which a defendant can show "real prejudice" if he is not permitted to comment on the silence of a co-defendant. *United States v. Kahn*, 381 F. 2d 824, 840 (7th Cir.), cert. denied, 389 U. S. 1015 (1967). See *Smith v. United States*, 385 F. 2d 34, 37-38 (5th Cir. 1967); *Kolod v. United States*, 371 F. 2d 983, 990-91 (10th Cir. 1967), vacated on other grounds, 390 U. S. 136 (1968); *Hayes v. United States*, 329 F. 2d 209, 221-22 (8th Cir.), cert. denied sub nom. *Bennett v. United States*, 377 U. S. 980 (1964). See also *United States v. McKinney*, 379 F. 2d 259, 264-65 (6th Cir. 1967). No such prejudice has been shown here.

9. Other points

The remaining contentions do not require extended comment.

a. Natarelli's claim that the second count should have been dismissed because one cannot be guilty of conspiring to transport stolen goods "Knowing them to have been stolen" under 18 U. S. C. § 2314 until the goods have in fact been stolen is without merit. *Cf. Williamson v. United States*, 207 U. S. 425, 446-47 (1908).

b. Since no objection was taken below we do not consider Cino's argument that he was deprived of his constitutional right to be present at every stage of his trial by the holding of numerous conferences in his absence in the judge's chambers. *United States v. Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

c. Caci contends that the district court erred in refusing to recall the jurors seven days after the verdict to learn whether any of them had heard and had been influenced by radio broadcasts on the evening prior to and on the morn-

ing of the charge referring to three of the defendants as having been linked to the Cosa Nostra. In view of the limited character of the publicity and the repeated and detailed admonitions by the court to the jury to refrain from listening to the radio, the court did not abuse its discretion in refusing to recall the jury. *Cf. United States v. Hoffa*, 367 F. 2d 698, 715 (7th Cir. 1966), vacated on other grounds, 387 U. S. 231 (1967).

d. Finally, appellants raise three objections to the jury charge, none of which we find to have merit.

The court charged with respect to accomplice testimony as follows: "such testimony is to be given close and searching scrutiny and is to be received with caution and weighed with great care. You should not convict a defendant on the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubts." Far from being inadequate, this charge was more favorable to appellants than was required. See *United States v. Mattio*, 388 F. 2d 368 (2d Cir. 1968).

The court did not err in instructing the jury that a change in the form of the stolen property was not fatal in a prosecution for interstate transportation under 18 U. S. C. § 2314. See *United States v. Walker*, 176 F. 2d 564, 566 (2d Cir.), cert. denied, 338 U. S. 891 (1949).

The instruction that the defendants need not have intended to affect commerce in order to be guilty was entirely correct. See *Nick v. United States*, 122 F. 2d 660, 673 (8th Cir.), cert. denied, 314 U. S. 687 (1941), cited with approval in *United States v. Varlack*, 225 F. 2d 665, 672 (2d Cir. 1955). See also *United States v. Pranno*, 385 F. 2d 387, 389-90 (7th Cir. 1967), cert. denied, 390 U. S. 944 (1968).

Affirmed.

APPENDIX B

Opinion of Henderson, D. J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,
vs.
FREDERICO RANDACCIO, *et al.*

Cr. 1967—115.

The defendant, Frederico Randaccio, has filed a motion to dismiss the indictment and to quash the jury venire impanelled in the above case. The motion is based on the manner in which the grand and petit jurors are selected in this district.

The Court is satisfied from its review that the jury system in the Western District of New York as a whole does not discriminate against any identifiable ethnic, racial, social or economic group and, therefore, is constitutional. See *United States v. Bowe,* 360 F. 2d 1, 7 (2d Cir. 1966); *United States v. Agueci,* 310 F. 2d 817, 833-834 (2d Cir. 1963), *cert. denied,* 372 U. S. 959 (1963).

The defendant seeks time to review the entire list of names on the jury venire in the hope that he might be able to establish some form of discrimination. This request is denied on authority of *United States v. Bowe, supra.* However, further brief comment is in order. In December of 1966, an article appeared in the Harvard Law

Review (Vol. 80 #2) which discussed the application of statistical decision theory to jury discrimination cases. It is a scholarly article and attracted sufficient attention to be included in a footnote to a recent Supreme Court case on this subject.[1] From a reading of this article, however, one should not be led to believe that discrimination necessarily can be established through application of statistical formulas and that review of the venire to that end, therefore, is always in order. Statistically improbable results in terms of the composition of the community obviously may be the result, not of discrimination but of the small size of the sample and the less than perfect sources for sampling which are available. Resolution of such underlying problems, of course, would require far greater manpower and huge expenditures of money, both of which are not presently available. The extent to which such effort, in pursuit of a perfect system, is warranted, is very much open to question.

The motion is denied.

So ordered.

Dated: October 24, 1967.

/s/ JOHN O. HENDERSON,
United States District Judge.

[1] Whitus v. Georgia, 385 U. S. 545, 552 (1967).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of July, one thousand nine hundred and sixty-eight.

Present: Hon. Leonard P. Moore,
Hon. Paul R. Hays, *Circuit Judges,*
Hon. William H. Timbers, *District Judge.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES CACI, a/k/a Bobby Milano; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a Pat Natarelli; FREDERICO G. RANDACCIO; and LOUIS SORGI,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk,

By VINCENT A. CARLIN,
Chief Deputy Clerk.

Appendix D.

A true copy,
A. Daniel Fusaro,
Clerk.

APPENDIX D

32036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES CACI, also known as Bobby Milano; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a Pat Natarelli; FREDERICO G. RANDACCIO; and LOUIS SORGI,
Defendants-Appellants.

A petition for a rehearing having been filed hereby by counsel for the appellant Frederico G. Randaccio,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

s/ LEONARD P. MOORE,
s/ PAUL R. HAYS,
U. S. C. JJ.

s/ WM. H. TIMBERS,
U. S. D. J.

October 8, 1968.